

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
*See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24*

**FILED BY CLERK**

**MAR 24 2011**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

UNION PACIFIC RAILROAD COMPANY, )	2 CA-CV 2010-0125
)	DEPARTMENT A
Cross-Claimant/Appellee, )	
)	<u>MEMORANDUM DECISION</u>
v. )	Not for Publication
)	Rule 28, Rules of Civil
D.R. HORTON, INC. – DIETZ-CRANE, )	Appellate Procedure
)	
Cross-Defendant/Appellant. )	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200600269

Honorable Gilberto V. Figueroa, Judge

VACATED IN PART

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B R A M M E R, Presiding Judge.

¶1 D.R. Horton, Inc. – Dietz-Crane (D.R. Horton) appeals from the trial court’s amended judgment in favor of Union Pacific Railroad Company (Union Pacific).

It argues the court erred in denying its motion for judgment as a matter of law on Union

Pacific's punitive damages claim because there was insufficient evidence of its requisite mental state to support an award of punitive damages. We vacate the portion of the judgment awarding Union Pacific punitive damages.

### **Factual and Procedural Background**

¶2 Willie Burgis Speaks was driving an all-terrain vehicle near a Union Pacific railroad track when his vehicle struck a water pipeline and rolled over, causing his death. Patrick McKenny, a senior land manager for D.R. Horton, was responsible for constructing the pipeline to convey water from a nearby golf course pond, owned by Johnson Utilities, to D.R. Horton's construction development site. The pipe ran underneath a railroad track bed owned by Union Pacific, emerged above ground on the other side of the tracks until it reached an adjacent dirt road (Surrey Lane), where it again was moved underground until it re-emerged on the other side of the road and ran on the surface to the construction site. Speaks struck the pipeline in the area between the railroad tracks and Surrey Lane.

¶3 McKenny had negotiated an agreement with Gary Larsen, general manager of Johnson Utilities, to purchase water from the pond to use at the construction site. McKenny acknowledged he knew he would need to transport the water across railroad property to the construction site and had not received permission from Union Pacific to do so, but testified Larsen had given him permission to use one of Johnson's corrugated metal pipe crossings underneath the railroad's road bed to move the water from one side of the tracks to the other. Larsen disputed that testimony, stating there had been no such

agreement. Ultimately, McKenny constructed the water pipe to run under the tracks through a culvert that was not part of an easement owned by Johnson Utilities. McKenny saw the pipe's placement after it was installed.

¶4 Speaks's mother, Wilma Ladd, filed a negligence and wrongful death action on behalf of herself and Speaks's children against D.R. Horton and other defendants, later amending her complaint to add Union Pacific as a defendant. Union Pacific asserted a cross-claim against D.R. Horton for indemnification and trespass, which it later amended to add a claim for punitive damages. Union Pacific settled with Ladd, but continued to pursue its claims against D.R. Horton.

¶5 The jury awarded \$182,000 in compensatory damages to Ladd and \$40,000 to each of Speaks's three children. The jury apportioned fault as follows: Speaks 41%, defendant D.R. Horton 57%, defendants Johnson Companies 2%, and Union Pacific 0%. The jury also found in favor of Union Pacific on its claims against D.R. Horton for trespass and indemnity, awarding Union Pacific \$500,000 in punitive damages. The trial court later determined Union Pacific was entitled to \$131,645.98 in compensatory damages, representing its attorney fees, costs, and the amount for which it had settled with Ladd. The court previously had denied D.R. Horton's motion for judgment as a matter of law on Union Pacific's punitive damages claim, but ultimately reduced the punitive damages award to an amount equal to the compensatory damages. This appeal followed.

## Discussion

¶6 D.R. Horton argues the trial court erred in denying its request for judgment as a matter of law on Union Pacific’s cross-claim for punitive damages. We review de novo a court’s ruling on a motion for judgment as a matter of law, viewing the evidence in the light most favorable to the non-moving party. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 8, 180 P.3d 986, 992 (App. 2008).

¶7 D.R. Horton contends there was insufficient evidence it had the requisite mental state to support an award of punitive damages. To award Union Pacific punitive damages, there must have been evidence from which the jury could have found D.R. Horton had acted with an “evil mind,” which may be found where it either “intended to injure the plaintiff” or had “consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.” *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986). The jury must have been able to find D.R. Horton was “aware of and consciously disregard[ed] a substantial and unjustifiable risk that significant harm would occur.” *Id.*, quoting A.R.S. § 13-105(10)(c)<sup>1</sup> (defining criminal recklessness). The inquiry must focus upon D.R. Horton’s mental state; it would have the requisite “evil mind” only when it “should be consciously aware of the evil of [its] actions, of the spitefulness of [its] motives or that [its] conduct is so outrageous,

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<sup>1</sup>This provision has been renumbered, effective “from and after December 31, 2008.” See 2008 Ariz. Sess. Laws, ch. 301, §§ 10, 120. For ease of reference and because no substantive change was made to the definition, see *id.* at § 10, we refer to the current section number.

oppressive or intolerable . . . that it creates a substantial risk of tremendous harm to others.” See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986).<sup>2</sup>

¶8 Punitive damages may be recovered “only upon clear and convincing evidence of the defendant’s evil mind.” *Id.* at 332, 723 P.2d at 681. Although a trial court should allow a jury to choose among reasonable inferences, *Quintero v. Rogers*, 221 Ariz. 536, ¶ 21, 212 P.3d 874, 880 (App. 2009), it should not permit the jury to consider an award of punitive damages “if the evidence supporting such an award is only slight and inconclusive,” *id.* at ¶ 17, quoting *White v. Mitchell*, 157 Ariz. 523, 529, 759 P.2d 1327, 1333 (App. 1988).

¶9 Viewing the evidence in the light most favorable to Union Pacific, we conclude there was insufficient evidence D.R. Horton acted with the requisite “evil mind” to support an award of punitive damages against it on Union Pacific’s cross-claim. Although the trial court found McKenny had “not consider[ed] the consequences of laying the pipe where he did,” Union Pacific contends the jury had sufficient evidence before it to conclude McKenny knew the pipe “created a hazard to vehicles which might drive by.” During his deposition, read into evidence at trial, McKenny acknowledged the pipe could cause a safety risk if laid across Surrey Lane, stating that it “made sense to put

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<sup>2</sup>To the extent the trial court relied on *Gila Water Co. v. Gila Land & Cattle Co.*, 30 Ariz. 569, 249 P. 751 (1926), for the proposition that willfully committing a trespass is sufficient to permit an award of punitive damages, we note the correct standard requires more. See *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578 (“Something more than the mere commission of a tort is always required for punitive damages.”).

[the pipe] underneath the roadway” because if a car or motorcycle hit it, “somebody could get hurt.” Therefore, he buried the pipe under Surrey Lane “even though it is not a roadway, not an official roadway, not a recognized street.” He buried it “so that people wouldn’t get upset . . . [and so the pipe would not prevent people from] us[ing] their path through the desert or cause an accident.”

¶10 McKenny described the area where the accident occurred, between the railroad track and Surrey Lane, as follows: “As far as I know, it is for drainage. It looks more like a ditch to me.” He did not bury the pipe in that area because he “didn’t think anyone would be driving in a ditch.” He testified that, although he had seen all-terrain vehicles and cars on Surrey Lane, he never had seen anyone operating a vehicle in the “ditch” between the road and the railroad tracks.

¶11 When McKenny was asked about his state of mind when he saw where the pipe had been placed, he responded:

A: I drove around on the dirt road and looked to make sure it was safely under the road to not impede traffic again. I saw it going across the desert on the side.

Q: You would agree with me to the extent that pipe crossed any dirt road that was used for travel, that it would be negligent to lay a pipe across a road such as that?

A: Common sense tells me you don’t lay a pipe across a road, whether it is a road or not because somebody will come along.

Union Pacific repeatedly relies on McKenny’s acknowledgment that “you don’t lay a pipe across a road, whether it is a road or not,” as evidence that McKenny knew placing

the pipe in the area between the railroad tracks and Surrey Lane was “dangerous.” However, McKenny’s statement was in response to a question about roads “used for travel.”<sup>3</sup> McKenny previously had acknowledged it was necessary to bury the pipe under a road used for travel, like Surrey Lane, even if it was “not a roadway, not an official roadway.” McKenny’s response provides no evidence he believed the area between the railroad tracks and Surrey Lane was used for travel. As Union Pacific points out, McKenny’s statement might suggest he knew the pipe would present a hazard “to anyone who might come along,” but this is not proof he had acted with an “evil mind” unless he knew there was a substantial risk someone would operate a vehicle in that area. McKenny’s testimony was insufficient to allow a reasonable jury to find by clear and convincing evidence that he both was aware of and disregarded a substantial risk to vehicle traffic by placing the pipe above ground between the railroad tracks and Surrey Lane. See *Linthicum*, 150 Ariz. at 331-32, 723 P.2d at 680-81.

¶12 Although Union Pacific concedes McKenny’s testimony was the only evidence directly relevant to his state of mind, it points out that other witnesses had a different characterization of the area between the railroad tracks and Surrey Lane. Jeffrey Lange, a safety consultant who testified for the plaintiff, described this area as a “traveled dirt road” and a “service road.” In his opinion, it was foreseeable that people would use

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<sup>3</sup>Even if we were to disregard the context, the broadest possible interpretation of McKenny’s response is that he believed it was dangerous to lay a pipe anywhere. A reasonable jury could not conclude McKenny believed laying pipe in any location caused a substantial risk of injury.

the area as a road, in part because he observed tracks in the area after the accident. Lange only had read McKenny's deposition and did not testify he had any additional knowledge of McKenny's state of mind. Larsen stated he previously had observed maintenance trucks and all-terrain vehicles in the area between the railroad tracks and Surrey Lane, although not in the general area where the accident occurred. Larsen offered no testimony that McKenny had seen vehicles use that area or about McKenny's state of mind as to the potential risk posed by the pipe's placement.

¶13 Although a jury may infer the presence of an evil mind from a wrongdoer's expressions, conduct, or objectives, *Gurule v. Ill. Mut. Life and Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987), no witness, including McKenny, provided sufficient evidence from which a reasonable jury could conclude he had been aware of and consciously disregarded a substantial risk caused by placing the pipe in the area where the accident occurred.<sup>4</sup> Absent evidence McKenny had an "evil mind," the trial court

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<sup>4</sup>Union Pacific suggests a reasonable jury could have found McKenny had "actual knowledge" there were all-terrain vehicle riders in the area that could encounter the pipe despite his testimony otherwise. However, Union Pacific acknowledges there was conflicting evidence from other witnesses about whether the pipe posed a risk. Although conflicting evidence does not preclude finding an "evil mind," *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 558 n.14, 832 P.2d 203, 211 n.14 (1992), it is insufficient to allow a reasonable jury to infer by clear and convincing evidence that any person in McKenny's position actually must have known there was a substantial risk of harm.

erred in denying D.R. Horton's motion for judgment as a matter of law on the issue of punitive damages.<sup>5</sup>

¶14 Moreover, even if the evidence would have supported the conclusion that McKenny consciously had disregarded a substantial risk to non-railroad vehicle traffic, such evidence would not necessarily establish McKenny was aware of and consciously disregarded a risk to Union Pacific. In order to possess the requisite state of mind, a wrongdoer must continue to act in a harmful way "in deliberate contravention to the rights of the victim." *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679; *see also Dawson v. Withycombe*, 216 Ariz. 84, ¶ 94, 163 P.3d 1034, 1061 (App. 2007) ("The intent or deliberate indifference required to justify the additional imposition of punitive damages is focused on the harm to the plaintiff.").

¶15 In its cross-claim, Union Pacific alleged D.R. Horton was liable for punitive damages because its conduct was intentional and willful "in conscious disregard of Union Pacific's right to be free from trespass on its property." Union Pacific also states it had a right to be free from "dangerous alterations" of its property, and not to be exposed to liability. Even assuming, without deciding, that McKenny's placing the pipe where he did created a substantial risk to Union Pacific, there is no evidence he

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<sup>5</sup>Although the trial court generally is in the best position to determine whether the evidence supports an award of punitive damages, *Rawlings*, 151 Ariz. at 163, 726 P.2d at 579, it may have relied, as noted above, on an incorrect legal standard when deciding to give a punitive damages instruction. *See supra* note 2. The court's finding that McKenny possessed the required "evil mind" did not refer to any evidence other than that we already have discussed, nor does the record support that any additional evidence existed.

considered when doing so the railroad's right to be free from trespass or its potential liability for accidents on its property, let alone consciously disregarded those matters.

¶16 D.R. Horton also argues the trial court erred by awarding punitive damages against it because the court found McKenny had acted "outside the scope of his authority." Because we vacate the punitive damages award, we do not reach this argument.

### Disposition

¶17 For the foregoing reasons, we vacate the portion of the trial court's April 26, 2010 judgment awarding Union Pacific punitive damages.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge